Date: February 5, 1999

IN THE MATTER OF:

Larry D. Smyth,
Complainant

Case No. 1998-ERA-23

v.

File No. 06-0030-98-804

Johnson Controls World, Inc.,
Respondent

For the Complainant:
Larry D. Smyth, *Pro Se*

For the Respondent:
S. Barry Paisner, Esq.
Dennis P. Bachlet, Esq.

Before:
David W. DiNardi
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. §5851 (hereinafter "the Act" or "the ERA"), and the implementing regulations found at 29 C.F.R. Part 24 and Part 18. Pursuant to the Act, employees of licensees of or applicants for a license from the Nuclear Regulatory Commission (hereinafter "the NRC") and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The following abbreviations shall be used herein: ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Complainant's Exhibit and EX for a Respondent's Exhibit.

On December 22, 1997, Larry D. Smyth (Complainant herein) filed a complaint of retaliation against Johnson Controls World, Inc. (Respondent herein), a subcontractor at the Los Alamos National Laboratory (LANL). LANL is run by the University of California for the Department of Energy and LANL is the Respondent's only customer. The Complainant, a pipefitter employed by Respondent, alleged that Respondent unlawfully laid him off in April 1997 when he refused to accept an illegitimate transfer and that it subsequently imposed restrictions on his ability to be rehired in a December 8, 1997 letter. (ALJ EX 1) The complaint was referred to the Office of Administrative Law Judges under cover of letter dated March 12, 1998. (ALJ EX 3) A hearing was held before the undersigned from September 14-17, 1998 and September 28 and 29, 1998 in Santa Fe, New Mexico. (ALJ EX 8; ALJ EX 16) All parties were present, had the opportunity to present evidence and to be heard on the merits.

On January 22, 1998, Administrative Law Judge Paul H. Teitler issued a Recommended Decision and Order Approving Settlement, 98-ERA-3 (ALJ 01/22/98), of the Complainant's July 9, 1997 ERA complaint against the Regents of the University of California, LANL. (ALJ EX 12) Among other provisions, the Settlement Agreement released and discharged the Regents of the University of California, operating the Los Alamos National Laboratory, its officers, director, agents, representatives and employees from actions up to and including the date of the agreement.[1] The Settlement Agreement further provided that Complainant Smyth would comply with all applicable safety policies and regulations and otherwise demonstrate an appropriate craftsman's attitude "when he returns to work at" LANL "as an employee of Johnson Controls Northern New Mexico or its successors" and that, upon said return to work, Complainant Smyth's access to work in Laboratory facilities would be limited only by security clearance or other considerations no different than for other employees of Johnson Controls Northern New Mexico or its successors. (ALJ EX 12, paragraphs no. 4 and 6) By Final Order dated March 13, 1998, the Administrative Review Board approved the Settlement Agreement commemorated in Judge Teitler's Recommended Decision and Order.

Post-Hearing Exhibits

ALJ EX 17	Letter from this Office with hearing exhibit enclosed	10/02/98
EX 14	Letter from Respondent's counsel dated October 26, 1998 regarding receipt of transcript	11/02/98
CX 13	Undated letter from Complainant regarding non-receipt of transcript	11/05/98

[1]The date of the Agreement is not indicated in the Recommended Decision and Order Approving Settlement.

CX 14	Letter from Complainant dated November 8, 1998 stating he did not and will not request a transcript	11/12/98
EX 15	Letter from Respondent's counsel dated November 10, 1998 proposing a hearing date	11/13/98
ALJ EX 18	Order Establishing Briefing Schedule	11/13/98
EX 16	Respondent's Post-Hearing Brief	12/21/98
CX 15	Complainant's Post-Hearing Brief	12/21/98
EX 17	Respondent's Reply Brief to Complainant's Request for Damages	01/04/99

The following are the uncontested facts (EX 5)

1) Complainant disengaged from employment with Respondent on April 26, 1997;

2) Complainant, after leaving employment with Respondent, worked for Foley Construction;

3) On June 1, 1997, Smyth v. JCI, complaint number 6-0030-97-801 was filed;

4) On July 9, 1997, Smyth v. LANL (Regents of California) was filed;

5) On July 29, 1997, Smyth v. JCI, complaint number 6-0030-97-801 was dismissed and no appeal was taken;

6) On December 8, 1997, Dave Williams sent Complainant a letter regarding terms of re-hire;

7) On December 16, 1997, Dennis Bachlet sent Complainant a re-hire letter which rescinded the December 8, 1997 letter;

8) On January 22, 1998, Administrative Law Judge Teitler entered Recommended Decision and Order Approving Settlement in the matter of Smyth v. LANL;

9) On January 28, 1998, the above-captioned complaint was filed with DOL; and

10) On August 3, 1998, Complainant is re-hired by Respondent pursuant to the settlement with LANL.

I. Summary of the Evidence

A. Factual Basis of the Present Complaint

The Complainant noted a turn for the worse in his professional relationship with the Respondent in 1996. At that time, the Complainant was assigned as a Pipefitter to Facility Management Unit (FMU) 70, TA-16, in and out of the exclusion area, an area in which Mr. Bob Grace, a LANL employee, was second in charge. TA-16 is a high explosives (HE) area where research and development of high explosives is conducted. Complainant's last day of work with Respondent was on April 25, 1997.

On December 9, 1997, during the negotiation of the settlement agreement with LANL, Complainant was presented with a letter from Respondent dated December 8, 1997. The letter read

> Johnson Controls Northern New Mexico agrees that when we place a call for Pipefitters you will be given the same opportunity for employment as any other Pipefitter with your skills. When you are hired, it will be under the same conditions as those of any other Pipefitter who resigned from Johnson Controls World Services at the same time.
>
> It is mutually understood by both parties that you will be assigned to either the central maintenance or utilities departments.

(ALJ EX 15) Upon presentation of this letter during the settlement negotiation, Administrative Law Judge Teitler told Attorney Ellen Castille, counsel to LANL, to go back to Respondent because the letter did not conform to the agreement. None of Respondent's officials were available on that day. (TR 242-244)

The Complainant viewed the December 8 letter as retaliation because it restricted his ability to be rehired by Respondent. According to Complainant, the two departments identified in the December 8 letter "hardly ever hire anybody. They transfer people around within their organization," except for one area in which the Complainant is not skilled. (TR 96, 103-104)

Within a few days after December 9, 1997, Complainant spoke with Attorney Dennis Bachlet, general counsel to Respondent, about his concern with the letter and Attorney Bachlet requested that the Complainant allow him two days to look into getting Complainant back into maintenance. (TR 166-167, 758-759) Attorney Bachlet informed Complainant that Jon Mike Barr refused to place

Complainant back into maintenance[2] (TR 167), but Mr. Barr said that he would place Complainant in any area when a position opened and a call was placed. (TR 168, 101-103) A new letter, dated December 16, 1997 was issued and it informed the Complainant that

> Johnson Controls Northern New Mexico agrees that when we place a call for Pipefitters you will be given the same opportunity for employment as any other Pipefitter with your skills. If you are hired, it will be under the same conditions as those of any other Pipefitter who resigned from Johnson Controls Northern New Mexico.
>
> It is mutually understood by both parties that you will be assigned in accordance with the Pipefitters Collective Bargaining Unit.

(ALJ EX 14) Although the Complainant testified that he viewed the December 16 letter as further retaliation (TR 130), he also testified that this was not a basis of his complaint. (TR 123)

Mr. David M. Williams, manager of business operations for Respondent for approximately two and a half years, had never met Complainant prior to hearing, knew nothing about him, his position with Respondent or his status of employment. Mr. Williams authenticated his signature on the December 8 letter and stated that it was his understanding that FMU 70, TA-16, did not want Complainant reassigned to that unit. (TR 570)

According to Mr. Williams, the letter was drafted by Karen Canfield and Attorney Bachlet based upon their understanding of the Complainant's circumstances as related to Mr. Williams from Attorney Castille, counsel to LANL. (TR 570-571) Attorney Castille telephoned Mr. Williams on a day that Attorney Bachlet was out ill and informed him that, as part of the settlement of the case against LANL, Complainant was requesting a letter from Respondent stating that he would be eligible for rehire. (TR 571) Attorney Castille did not mention that the rehire had to be in any particular department, and Mr. Williams denied informing Attorney Castille that Complainant had burnt a lot of bridges.[3] (TR 571) Mr. Williams assumed that the terms of the letter were mutually agreeable, without speaking with Complainant, because the LANL case was being settled.

Although there are twenty-two FMUs at LANL and although only one did not want Complainant reassigned there, a restriction from the other twenty units was also issued. This restriction was just "somehow" put into the letter. Upon cross examination, Mr. Williams stated that he believed "it was on the advice of Mr. Bachlet." (TR 575, 578) He sent the letter to Attorney

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[2]Mr. Barr, Mr. Hanson and Mr. Ernst discussed with second in command Mr. Grace, manager Mr. Carothers and third in command Mr. Anderson about replacing Complainant into the area. The response was absolutely not. (TR 739)

[3]According to Complainant, Attorney Castille told him that Mr. Williams said that Complainant had burned a lot of bridges. (TR 166)

Castille via facsimile and shortly thereafter learned from Attorney Castille that the Complainant was not happy with it. Mr. Williams' involvement ended at this point.

Attorney Dennis Paul Bachlet, Manager of Labor Relations and Legal Services for Respondent, is responsible for the craft labor force disciplinary actions, contractual interpretations and negotiations. Attorney Bachlet was ill and at home on December 8, 1997, when he was telephoned by Mr. Williams, who asked Attorney Bachlet to telephone the union and obtain their position on the matter. Attorney Bachlet telephoned Rick Blea and then Peggy Griego, who is the labor relations assistant for Respondent, to "give her some language for that letter." (TR 697) Attorney Bachlet denied incorporating the restrictive language or having any knowledge about why the restrictions were included. (TR 728-729) According to Attorney Bachlet, Mr. Williams was mistaken in his testimony to the contrary. (TR 709) Attorney Bachlet saw the letter for the first time on December 10, and noted that the language in the letter did not comport to the settlement agreement because there were restrictions on where Complainant could work.

He did not, however, immediately correct the language on December 11 because the Complainant's name would have appeared on the union list if he was out of work. (TR 698) For this reason, the December 8 letter had absolutely no effect on Complainant's future employment with Respondent. Nevertheless, the December 8 letter was eventually changed because Complainant telephoned Attorney Bachlet on December 15 and informed Attorney Bachlet that he would file a complaint if it was not changed. Attorney Bachlet informed General Manager Barr of this on December 16 and he instructed Attorney Bachlet to send a letter without any restrictions.

According to Mr. Eric Rodholm Ernst, manager of zone operations, the December 8 letter eliminates a "whole bunch" of departments and restricts the Complainant from the chance of working in an "awful lot" of different areas. (TR 307-309) The December 16 letter, however, only restricts the Complainant with those restrictions that would otherwise be in his union agreement. (TR 309)

B. Actions Shortly Predating Complainant's Attempted Transfer and Lay-off

Complainant testified that his employment problems started after he signed an Employee Safety Commitment on July 16, 1996. This document was generated in response to serious electrical shocks sustained by several employees, including Complainant. (ALJ EX 10-8; EX 6; TR 564) The Safety Commitment included a five-step approach to safety, which was to be approached in a meticulous manner and placed before production, and it allows an employee to stop the work any time he or she perceives a safety violation. (TR 146)

When the safety commitment was put into effect, Mr. Delmar Duncan, foreman at TA-16, was required to review the hazards of the job with the employee. The Complainant, however, informed Mr. Duncan that he was very familiar with the area and that he preferred to just proceed with his work. Mr. Duncan was informed by John Paolino, Tony Poole, Roy Hopwood and several other

people from JCI safety that a qualified journeyman can scope his own job. (TR 349) Mr. Duncan did not have time to do it when he had "99 jobs" and he was only "one man." (TR 348)

Subsequent to signing the commitment, the Complainant was involved in a number of incidents during which he requested additional paperwork to allay certain safety concerns and he thought that the paperwork was unfairly denied. This resulted in Complainant approaching Mr. Greg Hanson, manager of all of the FMUs, and specifying nine safety and health issues, which were addressed in a report dated March 20, 1997.[4] (ALJ EX 10-9) According to Complainant, LANL and some of Respondent's employees responded to his filing of these issues by concocting false accusations that the Complainant was dangerous and violent. (TR 85)

In an April 15, 1997 e-mail, Mr. Bob Grace informed Mr. Duncan and Mr. Belyeu that, based upon "many instances of unusual observed performance" by Complainant in the work place, Complainant's work assignments were to be limited to those outside the HE exclusion area and outside the ESA Nuclear Facilities. (EX 2) He further stated that the limitation would remain in effect until Respondent could adequately satisfy Mr. Grace's concerns.

On April 15, the Complainant was sent home from work with no explanation, and then invited back two days later. (TR 87-89; 148) Complainant later learned that he was sent home because LANL had sent an e-mail stating that he was restricted from certain areas and all of the available work on that day was in those areas. The Complainant started to walk back to Santa Fe and described it as humiliating. Upon learning that the Complainant had been sent home, Attorney Bachlet telephoned LANL and told them that it violated the contract by sending Complainant home. (TR 149) It was clear to both Messrs. Belyeu and Ernst that Complainant was a whistleblower during this time and it was clear to Attorney Bachlet that there was a whistleblower investigation being conducted. (TR 283, 584)[5]

In an April 25, 1997 e-mail, Mr. Grace specified those instances of unusual performance upon which he relied in reaching his decision to exclude the Complainant from the HE exclusion area and the ESA Nuclear Facilities. (EX 2) He cited a March 21, 1997 instance during which the Complainant allegedly set up an electrical hand tool and an unacceptable electrical extension cord; a March 24, 1997 instance during which the Complainant allegedly refused to remove his lock out from a main steam valve; and an occasion when Complainant allegedly violated an Activity Hazard Analysis (AHA) which designated, as a work precaution, that the worker wear long sleeves to perform the job. In addition, Mr. Grace cited to unspecified occasions when Complainant threw tools in the shop, an occasion when he threw pipe from the pipe rack, yelled and screamed at his foreman and zone manager and refused requests to do safe and authorized work. It was Mr. Grace's

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[4]One of the issues concerned exposure to asbestos. (TR 172) Some of the safety related concerns, although not validated by safety professionals, were found to be made in good faith. (TR 142)

[5]Page 584 is missing from the duplicate transcript, but is in the original.

understanding, from speaking with "all the other pipe fitters in the shop," that they felt threatened by the Complainant and did not want to work with him. Based upon these incidents, plus the fact that Complainant was "costing [Mr. Grace] a fortune" and contributing only about five productive days of work since February 28, 1997, Mr. Grace requested that Complainant be immediately removed from his payroll and from the FMU.

According to Attorney Bachlet, Respondent is not aware of what level of investigation was conducted by LANL prior to Mr. Grace deciding not to have Complainant work for him anymore. (TR 762) Once Attorney Bachlet was advised of LANL's position in regards to Complainant, however, he initiated an internal investigation of the Complainant which was conducted by Mr. Dominguez and Mr. Morgan. The investigation resulted in a report, dated April 28, 1997, but the report was not completed prior to the time of Complainant's last day of work. (TR 763) Respondent has a 120 day call back procedure pursuant to the collective bargaining agreement, but Complainant was not called back once Mr. Dominguez' report was received by Respondent. Attorney Bachlet stated that this was because unnamed upper management spoke with people at TA-16 but they were adamant that they did not want him back. (TR 770-771)

Mr. Martin V. Dominguez, lead labor relations representative, was issued the assignment of trying to resolve the personnel issues within TA-16. He undertook the investigation and forwarded his report to Jon Mike Barr, Respondent's general manager and president. (ALJ EX 10-6) As part of that investigation, general manager Barr directed Mr. Dominguez to interview all the employees. Mr. Dominguez could not recall why Complainant was not interviewed. (TR 650) In his report, Mr. Dominguez recommended, among other things, removal of the restrictions imposed by LANL on Complainant because Complainant's co-workers had given him the impression that Complainant was considered a good worker who knew what he was doing. (TR 647)

Neither the Complainant nor his co-worker, Mr. Danny Green, was allowed the opportunity to participate in the investigation. The Complainant suggested that the reason Mr. Green was not interviewed even though the Complainant had worked closely with him for approximately one and a half years was that Mr. Green previously gave testimony that the "company did not want to have to deal with," such as in a March 23 safety work control inquiry. (TR 159)

Because of the restrictions ordered by Mr. Grace, Mr. Eric Rodholm Ernst, zone operations manager for Respondent, directed Mr. Troy E. Belyeu, zone manager for Respondent since April 8, 1997,[6] to transfer the Complainant. The management's rights section of the collective bargaining agreement allows Respondent "the exclusive right to hire, suspend, demote, transfer or discharge employees, for just cause." Article VI, Section 1. Article 29 defines just cause. (EX 10) Complainant's transfer was ordered as a business necessity because, after Mr. Grace refused to allow Complainant in the high explosives area, he had to be moved to find work. (TR 707, 729, 739, 748)

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[6]Mr. Belyeu took over Mr. Hopwood's position. Prior thereto, Mr. Belyeu worked on special projects.

On April 25, 1997, the Complainant was informed by Mr. Delmar Duncan and Mr. Belyeu that he was to turn in his keys and tools because he was being transferred to TA-3-38. (TR 589) The Complainant refused the transfer, and Mr. Belyeu telephoned Mr. Ernst. Complainant informed Mr. Ernst that he refused to transfer because it was a violation of his whistleblower rights and that Mr. Ernst could fire him or lay him off, but that he would prefer a lay off. (TR 289, 589) Mr. Ernst, who tried to persuade Complainant not to request a lay off (TR 290-291, 297-298), responded that a lay off would be acceptable and asked the Complainant to put his request for a lay off in writing, which he did. The Complainant wrote "After not wanting a transfer I don't deserve which is against my rights and a direct retaliation against me I have requested to be laid off." (EX 1) Complainant repeatedly relied upon AM-729, which is the Administrative Manual, LANL, Whistleblowers Policy for Reporting Improper Activity, to contend that the ordered transfer was against his rights as a whistleblower. (CX 6)

According to Mr. Ernst, the only reason that Complainant was transferred was because of client dissatisfaction with his work. (TR 298) The e-mails from Mr. Grace concerned the thought that Complainant was "untrustworthy to be in an area where there were explosives" because he had "some temper problems and [had] thrown things around." (TR 310-311) Although Mr. Ernst has not heard that Complainant is violent, other than from the LANL document from Mr. Grace, he has heard that Complainant is a very competent pipefitter. (TR 282)

Attorney Bachlet expressed his opinion that Respondent had no alternative but to transfer Complainant when Mr. Grace requested that Complainant be removed from Mr. Grace's payroll because LANL could remove Complainant's security clearance and Complainant would not be allowed into the area.[7] (TR 705) Attorney Bachlet could approach a customer, probably through its legal department, and encourage that it reexamine the situation if he had an indication that the customer wanted to terminate or transfer an employee for illegitimate reasons. He could not, however, force the customer to do anything. (TR 737-738, 747)

Mr. Ernst testified that he has no ability to override LANL's decision that Complainant was not acceptable to work on one of the crews in a high security area. Mr. Ernst is sure that there was no effort to force Complainant out of work and that is the reason that Mr. Ernst attempted to persuade him not to resign. He is also sure that there was no joint effort by Respondent and LANL to force Complainant out of work because, as the number two person with Respondent at the time, Mr. Ernst would have had to have known about it. (TR 301)

[7]Similarly, Mr. Dominguez testified that Respondent cannot force Mr. Grace to put Complainant back on the payroll (TR 649) and Mr. Belyeu testified that Respondent has no option when Mr. Grace informed it that he did not want Complainant in the HE area. (TR 596)

Mr. Roy Hopwood, who was Complainant's supervisor between 1996 and 1997[8] and who was employed with Respondent for fifty years, declined to agree that the client can "dictate" whether or not a particular employee works on a project. Although he testified that Respondent generally tries to please LANL, he also testified that Respondent could have refused and would have had a chance of retaining the employee and that if he had been zone manager at the time, "we could have made other arrangements...I think Larry and I could have worked those out had this thing not gotten to the point that it did." (TR 557)

The Complainant maintained that he did not deserve the transfer because the incidents as identified by Mr. Grace in his e-mails were not accurate.

Lock Out/Tag Out Incident

The lock out/tag out was hung on the PRV project, a new steam boiler. (TR 142) The Complainant was concerned about the safety of the scaffolding in the area and a DOE representative informed him that the scaffold had been 'red tagged' as unsafe for several weeks. (TR 319-320, 546; CX 9) The Complainant was waiting for safety officials to inspect the scaffold, but it was taken down prior to their arrival. Once the scaffolding was removed, there was no way the Complainant could remove the tag because it was eight feet off the ground with a ten foot pit beneath it. (TR 260-261) Mr. Duncan informed Mr. Hopwood that the Complainant refused to remove his lock-out/tag-out. The next morning, Mr. Duncan and Complainant discussed ways in which the Complainant would feel safe in getting to and removing the tag.

Electrical Cord Incident

Complainant described the TA-16, Building 222 job, as a very serious and wet job which he stopped because of safety concerns, specifically an AHA violation. (TR 161, 520) An illegal electrical cord was laid out for this job and Complainant was accused of doing it. The Complainant maintained he was not responsible for laying out the illegal electrical cord because he was at the badge office and did not report to the work area until between 10:00 and 10:30 a.m. Mr. Juan Rivera, steward for Local 412, testified that he was informed by the foreman that Mr. Danny Green put the cord there. (TR 262) Nevertheless, Mr. Hopwood accused the Complainant of sabotaging the job.[9] (TR 162)

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[8]Mr. Hopwood has been transferred. He testified that Mr. Greg Hanson wanted to replace Mr. Hopwood and Mr. Duncan "because of this whistleblower thing." (TR 540) In Mr. Belyeu's opinion, Mr. Hopwood was removed because he did not work out the problems as a manger should, instead, he bad mouthed the departments with the customer. (TR 606)

[9]Mr. Hopwood denied going to LANL and accusing Complainant of sabotaging the job and making it look unsafe.

Mr. Danny Green, a pipefitter for Respondent, described Complainant as one who is concerned for the safety of himself and his co-workers and one with whom Mr. Green enjoyed working alongside in Zone 3 for over a year. Mr. Green laid out the tools for the job at TA-16 without the Complainant present and stated that he obtained the cord came from Mr. Duncan's truck. Mr. Green wanted to pick the tools up, but Mr. Hopwood would not let him do so.

Mr. Duncan, Mr. Van Gundy and Mr. Hopwood each testified that he did not witness the Complainant lay out the electrical cord. Mr. Duncan merely assumed it was Complainant because "as a foreman, [he] had to assume that one of the two" of them had set it up. (TR 354) Mr. Hopwood assumed that the Complainant and his work buddy had laid out the tools for the job. (TR 522-523)

Pipe Rack Incident

There is a pipe rack located outside of TA-16 in the back of 202. It is is in a non-fenced area and many employees have access to it. On one occasion, pipe was thrown off the rack and Complainant was accused of doing it. Everyone in the crew, except for Complainant, was interviewed in regards to the incident. (TR 593-594) Mr. Duncan accused the Complainant of doing it, although he did not witness it. He assumed it was Complainant because he had been assigned a job that required a particular size pipe. (TR 357) Mr. Van Gundy accused Complainant of throwing the pipe because Complainant made comments several times that no one took care of the rack. Mr. Hopwood believes it was Mr. Duncan who told him that Complainant had thrown the pipe off the rack, but he did not know whether or not Mr. Duncan had witnessed this. (TR 539)

Other Incidents Relied Upon in April 25, 1997 E-Mail

Mr. Duncan was the only witness who testified that he saw the Complainant throw a tool. He could only give one specific example and claimed that although there were other instances, he could not recall them with particularity. (TR 358) Despite this, Mr. Duncan described Complainant as the most unsafe worker he ever saw based on the Complainant's "general habits, the general way you did jobs, the way that you slam bang things around, the way you throw things together." (TR 357-358, 374, 392, 401-402) Mr. Belyeu testified that he was made aware of an incident when Complainant threw tools in the shop, although he did not state who informed him of this or when it occurred.

Mr. Hopwood and Complainant have had heated exchanges concerning a job. (TR 508-510) Mr. Hopwood was bothered by Complainant's "violent" temper and both he and Mr. Duncan have been yelled at by Complainant. Complainant could have been disciplined for yelling at Mr. Hopwood. Mr. Van Gundy has seen the Complainant yell and scream at Mr. Eloy Romero, Mr. Duncan and Mr. Hopwood. (TR 424, 433; AL EX 10-16)

In regards to the incident where Complainant allegedly was not wearing long sleeves although they were required by an AHA, the evidence at hearing revealed that Mr. Hopwood had not actually witnessed Complainant not wearing the safety sleeves. He was operating on information given to him by Mr. Duncan.

According to Mr. Duncan, everyone in the crew,[10] except for Danny Green, went to Mr. Duncan and told him they did not want to work with the Complainant because of his attitude. (TR 387) Indeed, Mr. Duncan, who considered it hard to get along with an employee who raised safety issues if those issues were not legitimate concerns, had a problem working with the Complainant. The fact that no employee wanted to work with Complainant created a problem because it limited which employees could be sent on jobs, limited productivity and failed to satisfy the customer. Complainant and Mr. Green were the only two who could work together. Mr. Duncan, however, subsequently testified that it was not a problem that Mr. Green and Complainant worked together because they got along well and worked well together. (TR 400)

Other Observations About Complainant's Performance

The witnesses who testified at hearing generally agreed that Complainant was a qualified pipefitter. Mr. Hopwood did not have a problem with the craftsmanship of any of the work that Complainant completed, Attorney Bachlet knew of no disciplinary action against Complainant prior to March and April 1997, and Mr. Duncan described the Complainant as a good worker prior to February 28, 1997.

The witnesses, however, offered alternating explanations for the negative turn in Complainant's performance in early 1997. There was testimony that Complainant's professional performance was adversely affected by the death of a family member, by a disagreement after a snow day in February, and by animosity harbored towards Mr. Duncan, who took over Complainant's position as foreman. Mr. Duncan described the Complainant as "combative." (TR 380)

In fact, Mr. Duncan believed that Complainant's safety issues were personal attacks on him because Complainant usually stated in his safety complaints or charges filed with the local union that Mr. Duncan was an incompetent foreman. (TR 380, 402) In Mr. Hopwood's opinion, Complainant had problems with Mr. Duncan because Mr. Duncan was brought in and made foreman when Complainant was on vacation. The Complainant would complain that he knew the areas better than Mr. Duncan and that Mr. Duncan was not qualified to instruct pipefitters. (TR 550, 565)

Mr. Hopwood agreed with the evaluation of Mr. Tom Rush, Department of Energy electrical safety officer, who wrote that Complainant seemed disgruntled and stressed and wanted to strike back or play a game by filing safety issues. In Mr. Hopwood's opinion, Complainant was playing a game

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[10]Interview notes from Human Resources indicate that Mr. Dominguez did not refuse to work with the Complainant. (TR 393; ALJ EX 10-6 and 10-7)

of trying to get Mr. Duncan removed by using safety. (TR 554) Mr. Hopwood felt that Complainant was acting inappropriately on the job and had a bad attitude because he fought with his supervisor continually. (TR 556) Such behavior poses a problem for a Q clearance employee who works in a high explosives area. (TR 553)

Apparently, Complainant's opinion that he knew more than Mr. Duncan, together with Complainant's perceived attitude that he was indestructible, perfect, and all-knowing, contributed to his being dubbed with the nickname "god." (TR 408, 421, 425) Although Mr. Hopwood denied hearing that Complainant was referred to as "god," he admitted that he spoke to the crew about the fact that Complainant wanted to set himself up as the authority on everything that came along. (TR 534)

According to Mr. Duncan, the procedure for addressing an employee issue was for him to initially approach the employee and if that was unsuccessful, for him to use his discretion and approach either Respondent's representative, Mr. Hopwood, or Mr. Grace at LANL. In the Complainant's case, he decided to go to Mr. Grace. (TR 395-396) In April 1997, Mr. Duncan told Mr. Grace at LANL that Complainant was unproductive because he was "spending more time on safety issues than...on the job." (TR 368) Between February 28, 1997 and April 26, 1997, Mr. Duncan stated Complainant had only five productive days of work. (TR 370)

Mr. Bill Van Gundy, a plumber for Respondent who had a problem working with Complainant, testified that safety was an issue for Complainant when it suited him and he used safety issues to malign Mr. Duncan. Complainant would raise a safety issue when he did not want to do a job, but ignore it when it suited him. (TR 428-429) Mr. Van Gundy is of the opinion that Complainant was removed from the explosives area because he complained about non-existent or illegitimate health and safety issues (TR 430-432) and used health and safety as a "crutch for everything, anything." (TR 412; ALJ EX 10-15)

Mr. Hopwood denied making the statement that Complainant had bought his ticket out of the area. According to Mr. Hopwood, an employee has a right to raise safety concerns and should stop a job if he or she felt it was unsafe. (TR 500-501) Mr. Hopwood was concerned, however, that Complainant would raise a safety issue after he had completed the job. According to Mr. Hopwood, he and Complainant discussed the Complainant's way of handling situations, but Complainant would just snap at Mr. Hopwood stating that he needed an attitude change.

Subsequent to April 25, 1997

The Complainant was out of work one day and the Foley Company hired him. (TR 178-179) Complainant continued to work for Foley Construction until approximately July 9, 1998 and was receiving a higher wage than that which he received from Respondent. Complainant was not on the out of work list during the time he worked for Foley Construction because he legally could not be.

Although Complainant believes that pipefitters are called for work on a daily basis, the first call that he received from the union hall was on July 23, 1998, when he was called by name pursuant to an employment requisition form. (EX 11) Usually, the Respondent's Human Resource Department will receive a requisition form from the field and it is processed and signed by Attorney Bachlet. A call goes out to the union hall with a request for a journeyman, apprentice or someone by name and that person reports for work. To be on the union hall list, a pipefitter must be out of work, qualified, and in possession of a state license. The July 23, 1998 call for Complainant originated from the construction department and, to Attorney Bachlet's knowledge, Human Resources and management had nothing to do with it. (TR 701) Attorney Bachlet informed construction that Complainant was not able to fill the call at that time because he was not in compliance with the new State licensing procedure. (TR 110; 665)

At Attorney Bachlet's suggestion, the call was held open until Complainant obtained that license and Complainant was hired on August 3, 1998 as a journeyman pipefitter in the construction department.[11] (TR 740) According to Complainant, he had to accept the offer for reinstatement in construction, even though it entailed heavier work, because he had to feed his family. On the day that Complainant was hired back, Attorney Bachlet approached him while he was filling out paperwork and asked him what he was going to do about his whistleblower complaint. (TR 726) He also informed Complainant that Mr. Ernst had done all he could do to keep the Complainant on the payroll.

At the time of hearing, all restrictions were lifted and the Complainant could work in any zone in LANL, provided that he possessed the appropriate security clearance. Complainant has an L clearance and stated that he can work in TA-16 in the equipment rooms and those facilities in which there is the most work. (TR 745) In fact, Complainant can perform work in a Q clearance area with an L badge if he is escorted by an employee with a Q clearance. This is regularly done.

II. Preliminary Matters

A. Jurisdiction

Respondent argued that DOL has no jurisdiction over this matter because it is an attempt to enforce the terms of the settlement agreement between Complainant and LANL. As such, Respondent argued, the OALJ has no power to enforce and/or set aside the settlement agreement. **See** EX 16, at pp. 5-7 (**citing Williams v. Metzler**, 132 F.3d 937 (3d Cir. 1997)). This Judge wholly agrees that the OALJ has no power to enforce and/or set aside the settlement agreement. In fact, I

[11]At the time that Complainant was called, there was no work for a maintenance pipefitter. (TR 743) On the day the Complainant came to work, however, Attorney Bachlet offered to let him resign as a construction pipefitter and come back as a maintenance pipefitter when there was an available position. (TR 743-744) According to Attorney Bachlet, however, Complainant has been adamant about not working on certain crews.

have previously partially dismissed a whistleblower action because it was an action to enforce or set aside a settlement agreement. **See Thompson v. Houston Light & Power Co.**, 96-ERA-34/38 (ALJ 03/11/98).

The Settlement Agreement provided that Complainant Smyth would comply with all applicable safety policies and regulations and otherwise demonstrate an appropriate craftsman's attitude "when he returns to work at" LANL "as an employee of Johnson Controls Northern New Mexico or its successors" and that, upon said return to work, Complainant Smyth's access to work in LANL facilities would be limited only by security clearance or other considerations no different than for other employees of Johnson Controls Northern New Mexico or its successors. (ALJ EX 12, ¶¶ 4 and 6) According to Respondent, it issued the December 8 letter with the purpose of assisting LANL's settlement of its case. Respondent has repeatedly argued that it is not a party to the Settlement Agreement consummated between Complainant and LANL and that it was not obligated to do anything under the agreement.

As such, this Judge finds and concludes that the letter merely confirmed Respondent's legally imposed obligation to hire or not hire the Complainant without regard to an illegitimate consideration. Indeed, Respondent could have declined to issue a letter at all. Respondent could not, however, issue a letter which imposed an apparently unwarranted and significant restriction upon the Complainant's ability to be rehired.

Complainant Smyth's claim is neither an enforcement action nor an action to set aside the Settlement Agreement he reached with LANL. Complainant Smyth's claim is that Respondent's act of issuing the December 8, 1997 letter, which included significant restrictions, was a retaliation against him based on protected activity. Therefore, jurisdiction is appropriately exercised by the undersigned.

Statute of Limitations

Respondent, after noting that a complaint for violation of the ERA must be filed within 180 days after the violation occurs, argued that a violation of the ERA based on Complainant's transfer and lay-off is time barred. The Complainant was advised of the intended transfer and requested a lay-off, in lieu of a transfer, on April 26, 1997. Accordingly, any complaint based on the transfer and lay-off must have been filed on or before October 26, 1997. Although Complainant did file a complaint within this time period, he subsequently withdrew it and did not timely renew it. **Howe v. Afftrex, Ltd.**, 94-ERA-8, at n. 1 (Sec'y 12/12/94) (citations omitted) (noting that a dismissal without prejudice does not toll a statute of limitations, but that expiration of the limitations period will bar a complainant from filing another ERA complaint based on the same facts).

During the hearing of this matter, this Judge accepted evidence dating back to mid-1996 and covering matters such as Complainant's alleged engagement in protected activity, the Respondent's order to transfer and reasons therefor, and Complainant's request to be laid-off. Respondent objected

at hearing and in its brief on a variety of grounds, including that these actions were barred by the statute of limitations.

Initially, this Judge was of the opinion that the evidence might support a continuing violation theory. Although the Complainant did not levy such an allegation in precise legal terms, the facts as he alleged them might have supported such a finding. **See Vogt v. Atlas Tours, Ltd.,** 94-STA-1 (Sec'y Apr. 19, 1994), **dismissed on other grounds**, (ARB 06/24/96) (the Secretary, who examined the *pro se* complainant's complaint, construed it liberally and held that the *pro se* complainant would not be held to the same standards for pleading as if represented by legal counsel). As such, this Judge was compelled to consider it.

This Judge, after having accepted all of the relevant evidence, agrees with Respondent and concludes that it is now plain that there are insufficient grounds to apply the continuing violation theory. Nevertheless, this evidence was properly accepted and is properly considered in the evaluation of this complaint because it establishes the proper background for the professional relationship between the parties, its deterioration, and the basis of the present complaint. **Diaz-Robainas v. Florida Power & Light Co.**, 92- ERA-10 (Sec'y Jan. 10, 1996) (the Secretary, who held that several of the complainant's complaints about performance appraisals were found to be untimely and not cognizable under a continuing violation theory, noted that they were evidence to consider when assessing the true character of other matters occurring within the limitations period); **Khandelwal v. Southern California Edison**, 97-ERA-6, at p. 15 (ALJ Aug. 12, 1998) (holding that although certain actions were barred by the statute of limitations, they were properly considered as evidence of a possible pattern of discrimination irrespective of the time of their occurrence).

Accordingly, the only issue before the undersigned administrative law judge is whether or not the December 8, 1997 letter, considered in the context of the relationship between the parties, violated the ERA. This issue shall now be considered on its merits.

C. Res Judicata

Respondent strenuously and repeatedly argued that the present claim is barred by the doctrine of *res judicata*. In support thereof, Respondent relied upon the July 29, 1997 Notice of Determination by the Occupational Safety and Health Administration (OSHA), which dismissed the complaint filed against Respondent on June 10, 1997.[12]

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[12]This Judge pauses to note that Respondent included in its argument that "[a]ll issues arising prior to April 1997 brought against LANL and JCI in Smyth 1 and Smyth v. LANL are identical in Smyth 2" and that Smyth 2 is Complainant's "third time pursuing the alleged ERA violation." (EX 16, at p. 10) Respondent might be implying, although it does not perfect its argument in this regard, that *res judicata* should attach to the Final Order of the Secretary in **Smyth v. LANL**, 98-ERA-3 (ARB 03/13/98). This Judge declines to apply *res judicata* to that Final Order for the non-exclusive reasons that said litigation was not between the same parties or

By letter dated July 29, 1997, the Dallas, Texas office of OSHA notified the Respondent that

> [a] determination has not been reached in [Complainant's] complaint at this time. Mr. Smyth has tendered a request to suspend any further investigative efforts in this matter. Consequently, his complaint is being dismissed, and he is afforded the opportunity to exercise his rights within the appellate process.

(EX 7) Because no request for a hearing was filed by the Complainant, OSHA's notification of determination became the final order of the Secretary of Labor. 29 C.F.R. 24.4(d)(2).

As Respondent argued in its brief, the law of *res judicata* is applicable to administrative proceedings when an agency, acting in a judicial capacity, resolves issues of fact properly before it. **Boroff v. Mail-Well Envelope Co.**, 931 F.2d 62 (10th Cir. 1991). **See Also Billings v. Tennessee Valley Auth.**, 91-ERA-12 (ARB 06/26/96) (applying doctrine of *res judicata* where a prior consolidated proceeding was dismissed pursuant to rule 41(b), which operates as an adjudication upon the merits unless otherwise specified). Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties based on the same cause of action. The judgment precludes the parties from relitigating issues that were or could have been raised in that action.

This Judge concludes that Respondent cannot invoke the doctrine of *res judicata* to bar the present action. The reasons for this conclusion are trifold.

First, it would not be appropriate to apply *res judicata* because there has not been a judgment on the merits. Rather, OSHA dismissed the complaint upon Complainant's behest and specifically stated that it did not reach a determination on the merits.

Furthermore, we know not whether this dismissal was intended to be with or without prejudice. On the one hand, if it were a dismissal "with prejudice," it would prohibit subsequent litigation between the same parties on the same cause of action, i.e., *res judicata* would be appropriately applied. **Ocelot Oil Corp. v. Sparrow Indus.**, 847 F.2d 1458, 1462 (10th Cir.1988). On the other hand, if it were a dismissal "without prejudice," the situation would be left as if the action never had been filed. **Brown v. Hartshorne Public School Dist. No. 1**, 926 F.2d 959, 961 (10th Cir.1991) (**citing** 9 Wright & Miller, Federal Practice and Procedure S 2367 (1st ed. 1971)). "[A] voluntary dismissal wipes the slate clean, making any future lawsuit based on the same claim an entirely new lawsuit unrelated to the earlier (dismissed) action." **Id.** Thus, the OSHA determination would not have *res judicata* effect.

The language used in OSHA's notice of determination most closely resembles an order of voluntary dismissal. **See Generally Wood v. Lockheed Martin Energy Sys.**, 97-ERA-58 (05/14/98) (dismissing compliant without prejudice where the complainant elected to pursue a

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their privies and because no issues of fact were resolved.

complaint filed with the Department of Energy). As such, it would not serve as a bar to the present action. In addition, it was the Complainant's testimony that he pursued a claim against LANL under the advice of Mr. William MacConnell, an OSHA investigator who told Complainant he could not pursue Respondent and LANL under one complaint. (TR 127) It was Complainant's understanding that his complaint against Respondent was not dismissed, but it was withdrawn under the advice of Mr. MacConnell. On December 8, 1997, it became evident to Complainant that Respondent was going to continue to retaliate against him and he initiated another complaint.

Second, assuming that the dismissal was "with prejudice" and that it was a judgment on the merits, Respondent would not be able to bear its burden of showing what was determined by the prior judgment. **Martinez v. Kerr-McGee**, 898 P.2d 1256 (N.M. Ct. App. 1995), **cert. denied**, 898 P.2d 120 (N.M. 1995). Respondent has ignored the fact that OSHA dismissed the first complaint because Complainant tendered a request to suspend any further investigative efforts into the matter. Therefore, the investigator was not able to reach a determination of whether or not the complaint was valid. As such, there were clearly no findings of fact rendered.

And finally, other considerations would militate against application of the doctrine. Although this Judge recognizes the importance of administrative *res judicata*, I also recognize that enforcement of that policy must be tempered by fairness and equity. **See Thompson v. Schweiker**, 665 F.2d 936 (9th Cir. 1982). Neither collateral estoppel nor *res judicata* is rigidly applied; rather, both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice. **Id.**, at 941 (citation omitted). In **Thompson**, the Court declined to apply *res judicata* because application of the doctrine would have been tantamount to a denial of due process where the record was patently inadequate to support the administrative law judge's findings. The Court concluded that fairness in the administrative process is more important than finality of administrative judgments. **Id.**

The regulations governing the scope of inquiry to be conducted by OSHA contemplate only an investigation and written determination supported by articulated reasons. The regulations do not contemplate a full blown adversarial proceeding at that stage. **See Generally Young v. Philadelphia Elec. Co.**, 87-ERA-11/36 and 88-ERA-1 (ALJ Order - Denial Of Motion To Dismiss 02/04/88). This Judge shall assume, without deciding, that an OSHA determination that reaches a conclusive finding as to whether or not the allegations of a complaint are valid may provide grounds for application of *res judicata* once it has become, by operation of the applicable regulation, the final determination of the Secretary of Labor.[13] In this case, however, the doctrine cannot be applied because the investigation was suspended and no conclusive finding was reached.

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[13]In a case such as this, OSHA applies the law to the facts established by its investigation, articulates the reasons for its determination, and, where appropriate, recommends an appropriate remedy. If a party failed to appeal from such a determination and it became the final order of the Secretary of Labor, it would be possible for an administrative law judge or court of law to attribute *res judicata* effect to the determination because of its articulation of facts necessary to its conclusion.

III. Discussion

This case proceeded to a full hearing on the merits. Accordingly, examining whether Complainant has established a *prima facie* case is no longer particularly useful and this Administrative Law Judge shall consider whether, viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence, that he was discriminated against for engaging in protected activity. **See Boudrie v. Commonwealth Edison Co.**, 95-ERA-15 (ARB 4/22/97); **Boytin v. Pennsylvania Power and Light Co.**, 94-ERA-32 (Sec'y 10/20/95); **Marien v. Northeast Nuclear Energy Co.**, 93-ERA-49/50 (Sec'y 9/18/95). To carry that burden, Complainant must prove that Respondent's stated reason for issuing the December 8 and 16, 1997 letters is pretextual, **i.e.**, that it is not the true reason for the adverse action and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 94-TSC-3/4, at p. 4 (Sec'y 12/1/95); **Hoffman v. Bossert,** 94-CAA-4, at p. 4 (Sec'y 9/19/95). It is not sufficient that Complainant establish that the proffered reason was unbelievable; he must establish intentional discrimination in order to prevail. **Leveille**, **supra**.

A complainant under the ERA must prove that retaliatory action was taken against him because he engaged in conduct listed in 42 U.S.C. §5851(a)(1), (2) or (3), which the Secretary has interpreted broadly to mean any action or activity related to nuclear safety. **Keene v. Ebasco Constructors, Inc.**, 95-ERA-4 (ARB 02/19/97) (complainant engaged in protected activity where he reported safety concerns that were neither frivolous nor extraneous to the safety interests promoted by the whistleblower protections of the ERA); **Van Beck v. Daniel Constr. Co.**, 86-ERA-26 (Sec'y 8/3/93) (complainant engaged in protected activity where he expressed concerns about non-nuclear hazards present during the construction phase of a nuclear power plant which had a potentially substantial effect on nuclear safety). **Cf. Roberts v. Rivas Environmental Consultants, Inc.**, 96-CER-1 (ARB 09/17/97) (dismissing complaint because employee raised concerns about occupational safety and health matters, rather than CERCLA protected activities); **Tucker v. Morrison & Knudson**, 94-CER-1 (ARB 02/28/97) (holding that certain safety concerns raised by complainant were not protected by the CERCLA because they did not relate to *environmental* safety, but rather to *occupational* safety) (emphasis in original).

Complainant has established that he engaged in protected activity and that Respondent was aware of it. On the one hand, the Complainant evidently did raise some safety concerns which were not shown to be within the purview of the ERA, such as his asbestos and scaffolding concerns. On the other hand, he was ordered to complete a job in a nuclear facility at LANL without proper documentation, which paperwork was denied by his supervision and discussed with Attorney Bachlet (TR 82-83, 85) and this Judge finds that this complaint was within the parameters of the ERA. Furthermore, the Complainant filed an ERA complaint against Respondent on June 10, 1997, and against LANL on July 9, 1997 and Respondent undeniably had knowledge of both complaints. The filing of these complaints is also activity which is protected by the ERA. **See** 42 U.S.C. §5851(a)(1)(D); 29 C.F.R. 24.2(b).

Respondent argued that the December 8, 1997 letter was not an adverse employment action for the reasons that Complainant was not an employee of the Respondent at the time the letter was

issued; because he was employed by Foley Construction at the time the letter was issued and thus was not on the out-of-work list; and because the letter, which Respondent was under no legal duty to issue in the first place, was changed eight days later. This Judge rejects each of these arguments and addresses each in turn.

Under remedial legislation such as the ERA, the term "employee" is construed broadly to include a former employee as long as the alleged discrimination is related to or arises out of the employment relationship. **Delcore v. W.J. Barney Corp.**, 89-ERA-38 (Sec'y 04/19/95), **aff'd**, **Connecticut Light & Power Co. v. Secretary of the U.S. Dept. of Labor**, 85 F.3d 89 (2d Cir. 1996). A former employee may bring an employee protection suit under the ERA as long as the alleged discrimination is related to or arises out of the employment relationship. **Id. See Also Grizzard v. Tennessee Valley Auth.,** 90-ERA-52 (Sec'y 09/26/91), **dismissed on other grounds**, (Sec'y 09/08/92); **Flanagan v. Bechtel Power Corp.,** 81-ERA-7 (Sec'y 06/27/86). In fact, the Secretary has held that a terminated employee who engaged in protected activity only after he was terminated may file suit pursuant to the ERA because a terminated employee might be viewed by management as an even more serious threat to cause trouble or expose wrongdoing, and a manager could still retaliate by interfering with prospective employment. **Garn v. Toledo Edison Co.**, 88-ERA-21 (Sec'y 05/18/95).

The Board has held that the ERA protects employees against a broad range of discriminatory adverse actions, including non-monetary losses. **Van Der Meer v. Western Kentucky Univ.**, 95-ERA-38 (ARB 04/20/98) (finding that although the employee, an associate professor, was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus and consequent negative publicity). In comparison, the Secretary has dismissed a complaint for blacklisting where no specific facts were set forth to show adverse action was taken. **Howard v. Tennessee Valley Auth.**, 90-ERA-24 (Sec'y 07/3/91), **aff'd**, 959 F.2d 234 (6th Cir. 1992); **Smith v. Tennessee Valley Auth.**, 90-ERA-12 (Sec'y 04/30/92). In both of these cases, the employees complained that a memorandum from respondent's general counsel to the vice president for nuclear power, which listed names of complainants and the status of their ERA complaints, was a blacklist. The Secretary, however, found that the memorandum was not adverse because there was no evidence that the memorandum was used for any purpose other than a legitimate business purpose and because it did not contain any language or instructions detrimental to the complainants.

Complainant Smyth is in a distinguishable position. The December 8 letter significantly restricted the departments within which the Complainant could possibly be re-hired and impeded his ability to fairly compete for any position for which he was qualified. The fact that no position became available or that Complainant was not available to fill that position because of his employment with Foley Construction is a fortuity that affects only the potential damages for which Respondent might be held liable.

Similarly, the fact that the letter was changed eight days after its issuance is more properly considered in assessing the damages to which Complainant might be entitled. It does not alter the fact that the action itself was adverse.

Respondent has also argued that the letter is not causally related to protected activity because it was requested by LANL and drafted by Mr. Williams, who did not know Complainant or his employment history, some eight months after Complainant's employment with Respondent ceased. (EX 16, at pp. 14-15)

When establishing a *prima facie* case, temporal proximity between the protected activity and the adverse action may be sufficient to establish the inference that the protected activity was the motivation for the adverse action. Although there is no bright line rule for determining what is and is not too remote, it is fairly clear that a period of eight months provides a sufficient nexus between the protected activity and adverse action to justify invocation of the causation inference. **See Goldstein v. Ebasco Constructors, Inc.**, 86-ERA-36 (Sec'y 04/07/92), **rev'd on other grounds sub nom. Ebasco Constuctors v. Martin**, No. 92-4576 (5th Cir. 02/19/93) (causation established where seven or eight months elapsed between protected activity and adverse action); **Seda v. Wheat Ridge Sanitation Dist.**, 91-WPC- 1, 2 and 3 (Sec'y Sept. 13, 1994) (complainants were laid off some eight months after their protected activity). In fact, the Secretary has recognized that a ten-month lapse between protected activity and adverse action may be sufficient. **See Carson v. Tyler Pipe Co.**, 93-WPC-11 (Sec'y 03/24/95).

Respondent evidently calculated temporal remoteness by measuring the time that had elapsed between Complainant's lay-off in April 1997 and the December 1997 letter. This Judge finds and concludes that a period of closer to ten months had elapsed between the time that the complainant raised safety-related complaints during the performance of his duties, which was in late February to early March 1997, and the time of the December 1997 letter. It is also a fact, however, that Complainant engaged in protected activity in June and July 1997 when he filed ERA complaints against Respondent and LANL. This equates to a mere gap of roughly five months between his last protected activity and the adverse letter. This Judge also notes that the complaint against Respondent was not dismissed until July 29, 1997 and the case against LANL did not reach settlement terms until right around December 8.

A marshaling of the evidence in this case corroborates the initial inference drawn from the temporal proximity between the protected activity and adverse action and establishes, by a preponderance of the evidence, that Respondent violated the ERA when it issued its December 8, 1997 letter. This Judge arrived at this conclusion based, in large part, on the inexplicable inclusion of significantly restrictive language in the December 8 letter which is clearly aimed at prohibiting the Complainant from working in TA-16. Rather than call a witness, such as Ms. Griego, Ms. Canfield or Mr. Blea, to offer their recollection of who initiated the restrictive language, Respondent allowed the record to stand on the conflicting testimony of Attorney Bachlet, who maintained that he did not order inclusion of that language, and Mr. Williams, who testified that the language was suggested by Attorney Bachlet. This Judge credits the testimony of Mr. Williams, who forthrightly recounted his recollection. Attorney Bachlet's failure to explain who drafted the restrictive language is disingenuous given that within days of its issuance, the Complainant telephoned Attorney Bachlet and insisted that he rescind the restriction or else Complainant would file an ERA complaint. One would reasonably

assume that some sort of inquiry would have been initiated at that time to determine the person responsible for language that might result in some sort of liability for the Respondent.

Furthermore, the evidence established that on or about March 25, 1997, Attorney Bachlet told Complainant to "stay clean and watch [him]self." (TR 151; ALJ EX 10-26 and 27) Complainant viewed this as a threat and intimidation because there was no other reason for Attorney Bachlet to tell him that he is "being watched" when he was following safety procedure. Complainant testified he understood that Attorney Bachlet told people that "we have to be careful with Larry, because he's under the Whistle Blower Program." (TR 118)

Attorney Bachlet stated that this was not a threat and that he was merely attempting to help Complainant realize that he needed to be aware that if he was going to report safety violations, he needed to follow the safety paper that he had signed. Complainant also had to be aware that there were people from LANL who had an interest in seeing what Complainant was doing and making sure that he followed the rules. Mr. Rivera, however, was present during the discussion between the Complainant and Attorney Bachlet and confirmed that Complainant was upset by this statement, which both he and Mr. Rivera interpreted as a warning. (TR 276) According to Mr. Rivera, the reason Complainant was transferred in the first place was that he was reporting safety and his general foreman at the time just wanted the job done. (TR 269)

This is compounded by the fact that Mr. Green "heard" that as soon as the safety investigation was over, the Complainant and he were "out of there." (TR 316) Indeed, Mr. Green was transferred and was told that it was time for him to get out of the FMU while the getting was good. Mr. Belyeu was responsible for transferring Mr. Green from the area and he stated it was because of workload. A short time later, however, several new employees were hired in the area. (TR 605)

At the time that Complainant was transferred, Mr. Belyeu knew that Complainant had raised safety concerns within the Respondent's organization (TR 615-619) and Mr. Duncan knew he was a whistleblower. Nevertheless, Respondent maintained that the transfer, and subsequently the December 8 letter, were the result of LANL's refusal to have Complainant work in the Q clearance area and because of Complainant's behavioral issues.

This Judge recognizes that whistleblower statutes do not restrict an employer in its operational decisions. **Bauch v. Landers**, 79-SDW-1 (Sec'y 5/10/79) (quoting the ALJ's R.D.O.). **See Also Ray v. Harrington**, 79-SDW-2 (Sec'y 7/13/79). The statutes do not, and should not, preclude management from taking steps to assure and maintain the effectiveness of its staff in enforcing a particular environmental statute and the employer should not be faulted for mandating an adverse action, such as reassignment or termination or removal, to achieve this action.

The details of the underlying incidents upon which LANL issued its refusal to have Complainant work in the Q clearance area and what Respondent refers to as Complainant's behavioral issues are murky at best. Indeed, Respondent was advised by its own labor representative that the restrictions upon Complainant should be removed within two days subsequent to Complainant's lay-

off. Respondent, rather than attempt to dissuade its only client from taking action which was conspicuously based on illegitimate considerations, perpetuated the discriminatory act by restricting Complainant's potential for rehire in its December 8 letter.

This Judge finds further evidence that the true motivation behind Respondent's action was illegitimate in the fact that Respondent has offered shifting reasons for its original effort to remove the Complainant from TA-16 and its subsequent effort to keep him out of that area in the December 8 letter. **See Hoffman v. Bossert**, 94-CAA-4, at pp. 3-4 (Sec'y 9/19/95) (holding the shift in reasons for the adverse action proffered by a respondent is indicative of pretext). On the one hand, Respondent maintains that its only reason for transferring the Complainant in the first place was the April 25, 1997 e-mail from Mr. Grace which created a business necessity to transfer Complainant. On the other hand, upper management appeared at the hearing of this matter and testified that Complainant had behavioral issues, Mr. Hopwood including his opinion that it was a problem that Complainant left the work area without notifying his supervisor despite the fact that this was not even cited in the April 25 e-mail.[14] I view this shifting explanation as evidence of pretext.

The evidence revealed that two employees previously had been banned from going into the explosives area because they had opened the blast door, which is a violation of the safety commitment (TR 558, 562), and one employee previously had been removed from the facility when he was found to be carrying a cigarette lighter in the HE area, which is a violation of policy. (TR 585) These prior acts do not alter my conclusion in this case because the Complainant's circumstance is distinguishable. Respondent did not even attempt to investigate the allegations relied upon to justify his exclusion from TA-16 and, after hearing testimony and accepting documentary evidence, it is clear that a cursory investigation would have or should have alerted the Respondent that action was being taken against Complainant for reasons that were, at best, uncertain. Indeed, Respondent's investigation resulted in Mr. Dominguez recommending removal of the restrictions placed on Complainant.

Accordingly, this Judge finds and concludes that the Respondent's stated reason for issuing the December 8, 1997 letter is pretextual. Complainant has proven, by a preponderance of the evidence, that Respondent's true reason for this letter was in retaliation for Complainant engaging in protected activity.

Respondent argued that it should prevail in this matter under the dual motive analysis. (EX 16, at p. 17) This Judge only reaches the dual motive analysis if I determine there is legitimacy to Respondent's stated reasons for the adverse employment action, a conclusion which I have specifically rejected for the aforementioned reasons.

Nevertheless, I note that the burdens of production and persuasion in whistleblower cases are governed by the statutorily delineated burdens of proof added by the 1992 amendments to the ERA.

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[14]Mr. Duncan and a tool buddy informed Mr. Hopwood that Complainant was leaving his work area without permission. Complainant hinted that he was with a steward in regards to whistleblowing at these times. (TR 559-560)

If a complainant successfully proves that his protected activity was a "contributing factor" to the adverse action, the respondent must then demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior," 42 U.S.C. §5851(b)(3)(D). **Talbert v. Washington Public Power Supply Sys.**, 95-ERA-35 (ARB 09/27/96). It is this Judge's reasoned conclusion that the Respondent has not presented clear and convincing evidence that it would have taken the same action if Complainant had not engaged in protected activity because the evidence contravenes Respondent's assertion of behavioral issues.

III. Damages

This Judge, having found the Respondent in violation of the ERA, is required to issue a preliminary order, effective immediately, awarding affirmative action to abate the violation and attorneys fees and costs. **29 C.F.R. Part 24.7(c)(2)**. **Overall v. Tennessee Valley Auth.**, 97-ERA-53 (ARB 04/27/98); **Varnadore v. Oak Ridge Nat'l Lab.**, 94-CAA-2/3 (Sec'y 09/11/95). This Judge must also issue a recommended order on the appropriate compensatory damages, if any. **29 C.F.R. Part 24.7(c)(1)**.

Complainant Smyth requests that he be assigned to work in maintenance, that he be granted the option to buy back 199 hours of annual and sick leave days accumulated before he left Respondent's employ, lost overtime pay for the period of April 30 through August 3, 1998, the date he was reinstated, emotional damage, and $700.00 paid to an attorney for review of his case as he was seeking an attorney to represent him. (TR 61-62) In his post-hearing demand for damages, the Complainant also requested $50,000.00 in personal injury; a yearly exam by a board certified pulmonologist, $600.00 in court expenses in regards to subpoenas, $1,047.84 in lost wages caused by Complainant's presence at hearing and $100.00 for photocopies. (CX 15)

The appropriate remedy in any given case is dictated by the violation for which the Respondent is found liable. In this matter, this Judge has found that the Respondent violated the ERA when it issued the December 8, 1997 letter. Complainant may recover those damages which were caused by the issuance of this letter.

Accordingly, it would not be appropriate to award Complainant Smyth's request for reassignment to maintenance, the option to buy back annual and sick leave, and lost overtime pay. These damages might have been caused by the Complainant's lay-off, but this Judge has found that the lay-off is barred by the applicable statute of limitations. Similarly, I conclude that the request for a yearly examination by a pulmonologist is not related to harm causally related to this ERA claim.

Complainant's request for $50,000.00 in personal injury is construed by Respondent as a claim for punitive damages which are not recoverable pursuant to the ERA. This is a legally correct argument, although this Judge is not convinced that Complainant intended this request as a request for punitive damages. Rather, this Judge construes it as a request for compensatory damages.

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment and humiliation. **See Generally Deford v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983) (decided pursuant to the ERA); **Nolan v. AC Express**, 92-STA-37 (Sec'y 01/17/95) (decided pursuant to an analogous provision of the STA). Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. **See Bigham v. Guaranteed Overnight Delivery**, 95-STA-37 (ALJ 05/08/96) (adopted by ARB 09/05/96); **Crow v. Noble Roman's Inc.**, 95-CAA-8 (Sec'y 2/26/96). **See Also Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y 10/30/91). Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB 09/29/98); **Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92).

It is appropriate to review other types of wrongful termination cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in a whistleblower case. Accordingly, this is precisely what this Judge has done. **See Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB 08/27/98) (wherein the Board reduced the ALJ's recommendation of $100,000 in compensatory damages to $20,000)[15]; **Doyle v. Hydro Nuclear Services**, 89-ERA-22 (ARB 9/6/96) (wherein the Board affirmed the ALJ's recommendation of $40,000 compensatory damages)[16]; **Bigham**, **supra** (wherein the Board increased the ALJ's award of compensatory damages from $2,500 to $20,000 after reviewing the observations and accounts of complainant's emotional distress)[17]; **Gaballa v. Atlantic Group, Inc.**, 94-ERA-9

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[15]The evidence established that the discriminatory conduct was limited to several cartoons lampooning complainant, complainant did not suffer loss of a job or blacklisting and did not incur financial losses, and evidence of mental and emotional injury was limited to his own testimony and that of his wife.

[16]The evidence which supported an award in this amount consisted of complainant consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

[17]At hearing, complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced a sparse Christmas. Finally, complainant testified the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed complainant's withdrawal in the weeks after

(Sec'y 1/18/96) (wherein the Secretary reduced the ALJ's recommended compensatory damage award from $75,000 to $25,000)[18]; **Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92) (wherein the Secretary reduced the compensatory award from a recommended amount of $20,000 to $10,000)[19]; **McCuistion v. Tennessee Valley Auth.**, 89-ERA-6 (Sec'y 11/13/91) (wherein the Secretary increased compensatory damages from the ALJ's recommended award of $0 to $10,000)[20];

Christmas.

[18]The ALJ recommended a $75,000 compensatory damage award based on the treating psychologist's finding that complainant suffered from chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continuing repercussions, and a general feeling of apathy. The psychologist further testified complainant will forever suffer from a full-blown personality disorder and a permanent strain on his marital relationship. The Secretary reduced the award based on the fact that the same psychologist indicated this psychological state was caused in part by a co-respondent who had previously settled out of the case and that part of that settlement compensated for part of complainant's compensatory damages.

[19]In **Lederhaus**, the evidence established complainant remained unemployed for 5 ½ months after his termination, he was harassed by bill collectors, foreclosure was begun on his home and he was forced to borrow $25,000 to save the house. In addition, complainant's wife received calls at work from bill collectors and her employer threatened to lay her off. Complainant had to borrow gas money to get to an unemployment hearing and experienced feelings of depression and anger. Complainant fought with his wife and would not attend her birthday party because he was ashamed he could not buy her a gift, the family did not have their usual Christmas dinner, and complainant would not go to visit his grandson. In fact, complainant cut off almost all contact with his grandson. The evidence revealed complainant became difficult to deal with and this was corroborated by testimony from complainant's wife and a neighbor. Complainant contemplated suicide twice.

[20]The evidence revealed the complainant was harassed, blacklisted, and fired. In addition, complainant lost his livelihood, he could not find another job, and he forfeited his life, dental and health insurance. The blacklisting and termination exacerbated complainant's pre-existing hypertension and caused frequent stomach problems necessitating treatment, medication, and emergency room admission on at least one occasion. Complainant experienced problems sleeping at night, exhaustion, depression, and anxiety. Complainant introduced into evidence medical documentation of symptoms, including blood pressure, stomach problems, and anxiety. Complainant's wife corroborated his complaints of sleeplessness and testified he became easily upset, withdrawn, and obsessive abut his blood pressure.

Blackburn v. Metric Constructors, Inc., 86-ERA-4 (8/16/93) (wherein the Secretary reduced the ALJ's recommended award of compensatory damages to $5,000).[21]

In **van der Meer**, **supra**, the complainant suffered little out-of-pocket loss: he lost no salary as a result of the leave of absence and there was no evidence of uncompensated medical costs. Other losses were non-quantifiable. The complainant was awarded, however, $40,000 in compensatory damages because the respondent took extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's failure to follow the conciliatory procedures contained in its handbook and complainant testified that he felt humiliated.

The Complainant testified that he felt like the Respondent slapped him in the face by revising the letter only after he filed a complaint. (TR 97, 124) He also felt like the livelihood of himself and his family were put in jeopardy and he just "couldn't take it no more." (TR 677) Despite the fact that Respondent has told him that it made an administrative mistake in issuing the December 8 letter, that "does not help" Complainant's health at all. (TR 124) While he represented himself at hearing, Complainant was clearly distressed by Respondent's repeated insistence that the December 8 letter was nothing more than an administrative error. Based on the foregoing, this Judge recommends a compensatory damage award in the amount of $10,000.00.

Although a *pro se* complainant is not entitled to attorneys fees for self representation, **Dutkiewicz v. Clean Harbors Environmental Services, Inc.**, 95-STA-34 (ARB 08/08/97), **aff'd**, 146 F.3d 12 (1st Cir. 1998), he or she is certainly entitled to recover any fees expended on an attorney or trying to obtain an attorney. Complainant Smyth testified that he incurred a legal expense of $700.00 in unsuccessfully trying to obtain an attorney to represent him in this action. This is a redeemable expense. Contrary to the Respondent's assertion that there was "no competent evidence" in the record to establish that Complainant incurred an attorneys fee, the Complainant testified under oath to this expenditure and this Judge credits that testimony.

A successful *pro se* complainant is also entitled to payment of the reasonable costs incurred in bringing the complaint, such as fees for typing, photocopying, mailing, telegrams, long distance telephone calls, and the like, **Johnson v. Bechtel Construction Co.**, 95-ERA-11 (Sec'y 09/28/95), witness and registered mail fees, **Nolan v. AC Express**, 92-STA-37 (Sec'y 01/17/95), and transportation, lodging and meals to attend the hearing. **Creekmore v. ABB Power Sys. Energy**

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[21]The testimony of complainant, his wife, and his dad established complainant was of the opinion that firing someone was like saying that person is no good. The evidence also established complainant felt really in a low and that he relied on his dad to come out of depression. The termination affected complainant's self-image and impacted his behavior, which became short with his wife. The wife testified to the stress and emotional strain on the marital relationship and the father testified to complainant's pride and work ethic and the fact that complainant felt sorry for himself after the termination.

Serv., Inc., 93-ERA-24 (Dep. Sec'y 02/14/96). In **Johnson,** 95-ERA-11 (Sec'y 02/26/96), the Secretary subsequently reimbursed the *pro se* complainant for certain expenditures because of items in the record or the details provided to support the claim, but disallowed items for which the Complainant only gave a rough estimation. The Secretary noted that it is best, although not essential, to attach receipts or bills reflecting a claimed cost item.

At hearing, the Complainant tendered a witness fee in the amount of $75.00 to each of eight witnesses. (TR 276-277, 311-312, 332-333, 446, 624) Complainant is entitled to recover $600.00 in witness fees. Complainant is also entitled to recover $1,047.84 in lost wages caused by Complainant's presence at hearing.

Complainant requests $100.00 for photocopying expenses. This Judge agrees with the Respondent that this appears to be a rough estimation and, as such, it would not be properly allowed.

In the interest of justice, however, the Complainant is hereby **GRANTED** twenty days to produce receipts for expenses incurred in the prosecution of his claim.

IV. RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, this Judge **RECOMMENDS** the following **PRELIMINARY ORDER**:

Respondent, Johnson Controls World, Inc., shall pay to Complainant, Larry D. Smyth,

1) attorneys fees in the amount of $700.00;

2) costs and expenses in the amount of $1,647.54, plus any further amount that Complainant can substantiate within twenty days of this Order. The additional amount, if any, will be determined and designated in a subsequent preliminary order;

3) Respondent shall immediately expunge Complainant's personnel file of the December 8, 1997 letter and any reference to it.

It is **FURTHER RECOMMENDED** that

4) Respondent pay Complainant compensatory damages in the amount of $10,000.00.

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DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jw

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. **See** 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).